

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 147 OF 2002

BETWEEN
ABDIRIZAKH SELEMAN TUKE.....PLAINTIFF
AND
DHOW MERCHANTILE (EA) LIMITED.....DEFENDANT

R U L I N G

KALEGEYA, J.

Mr. Maira, Advocate, for the Defendants is before this court armed with preliminary objections as follows:-

(a) The defendant, shall on the first day of hearing raise objection that the debenture alleged registered amounts to a nullity due to the action of the drawer and the attester being one and the same thus violating the Provisions of the Notaries Public and Commissioner for Oaths Ordinance, Cap.12 of the laws.

(b) By adopting annexure "D" and "E" to the plaint, the plaintiff has admitted that the sum loaned as per debenture has been paid and the plaintiff be stopped from claiming thereunder: Paragraph 5 of the plaint therefore amounts to admission by the plaintiff that he was paid save for the gentleman's agreement."

The Plaintiffs are represented by Mr. Jundu of Semgalawe, Jundu & Company, advocates.

Arguments were made by way of written submissions.

Briefly, Mr. Maira argued the 2nd preliminary objection by urging that by their very pleading as per amended plaint, the Plaintiffs admitted having been paid and therefore judgement should be entered by admission in terms of O.XII, Rule 4 CPC.

On the other hand, the Respondent's Counsel insisted that no reply should be effected on the 1st preliminary objection as it was not argued at all, while adding that the pleading clearly show the claimed balance of Shs 38,309,850/=.

With respect to Mr. Maira, the objections have no grounds upon which to stand.

As rightly argued by Plaintiff's Counsel, as the 1st objection was not argued at all it should be taken to have been abandoned. As to the 2nd objection, I am really surprised that it was raised at all. I am saying so because para.5 of the Plaint together with annextures "D" and "E" upon which Mr. Maira relies to infer admissions by plaintiff speak negatively loud to the fronted proposition. Ann. D referred to, addressed to the Defendants Counsel provides in part:

" The Loan Agreement was superseded by the Registration of the Debenture on 3.8.2000 and this was necessary when our client felt insecure with the management. In fact your client should tabulate their offer to repay the balance which now stands at Shs: 38,309,830/= as computed herein:

(1) Debit balance as per your annexure date 4.12.2000	54,190,500
(2) Subsequent appropriation as per the enclosed account	<u>13,880,670</u>
	40,309,830
(3) Less Cash paid on 8.1.2001	<u>2,000,000</u>
	38,309,830
	=====

The said letter, dated 10-4-2001 was in response to defendant's letter of 4/4/2001 in which they were only admitting a debt of shs 2.9 million in the following wording,

" The position now is as if the loan agreement has been resolved and the only thing your client can claim is his shs 2.9 million shillings."

And, the contents of para.5 of the plaint plainly cannot support what Mr. Maira is trying to impress. And, neither can the paragraphs that follow. No scintilla of admission that the debt has been paid can be discerned from the contents of para. 5-7 which run as under,

"5. That out of the amount advanced under the Debenture, the Defendant still has an outstanding balance of Shs. 38,309,850/= yet to be paid to the Plaintiff. Copy of the Plaintiffs letter dated 10th April, 2001 to the Defendant's Advocate is appended hereto as Annex "D".

6. That after the failure of the Defendant to pay the said balance of shs 38,309,850/= to the Plaintiff and in order to protect his investment in the company, the Plaintiff wanted to appoint a Receiver/Manager to the Defendant's company by virtue of his powers under Sections 6.1 to 6.2 of the Debenture but the Defendant refused. Copy of the Defendant's Advocate letter dated 4th April, 2001 is appended hereto as annex "E".

7. In spite of repeated demands, the Defendant has failed, refused or neglected to pay the above mentioned sum due or any part thereof to the Plaintiff. Copies of Defendants letter dated 4.4.2001 and Plaintiffs letter dated 21.08.2001 are appended hereto as Annex "F" and "G" respectively."

With respect to Mr. Maira, these are some of the unnecessary preliminary objections which all Counsel should always strive to desist from engaging in, to avoid stalling unnecessarily the court process.

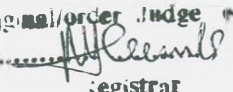
The preliminary objections stand dismissed with costs.

**L.B. KALEGEYA,
JUDGE**

Delivered.- in the presence of Mr. Mr. Maira and Prof. Safari.

**L.B. KALEGEYA,
JUDGE**

3/2/2003

I Certify that this is a true and correct copy of the original order of the Judge.

 Registrar
 Commercial Court
 Dar es Salaam
 Dated 3/2 of 2003